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IN THE

Supreme Court of the United States

October Term, 1943

No. 336

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HEARST PUBLICATIONS, INCORPORATED.

No. 337

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC.

No. 338

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HEARST PUBLICATIONS, INCORPORATED.

No. 339

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE TIMES-MIRROR COMPANY.

BRIEF OF RESPONDENT IN NO. 336 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN NO. 336 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, Hearst Publications, Incorporated, publisher of the Los Angeles Examiner, presents the following brief in opposition to the National Labor Relations Board's petition for a writ of certiorari in case No. 336 (being No. 10112 in the court below).

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 136 Fed. (2d) 608.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on June 10, 1943. The Board's petition for writ of certiorari was filed September 9, 1943. Notice of the filing of such petition and copy of the petition and of the record were served on counsel for this respondent on September 18, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

Statement.

Petitioner's Statement is inaccurate in certain respects.

Petitioner states (p. 6) that the district managers "keep lists of the newsboys in their districts." In the case of this respondent none of the newsboys were carried upon its payroll and there were no company records showing their names. [R. 1349, 1402, 1493.] In some cases company representatives knew the newsboys only by their nicknames. [R. 1600.] At the time of the hearing in the certification proceedings, this respondent was unable to produce any list of the names of its newsboys. [R. 1402, 1403, 1493.]

Herein references to pages of the record are designated R. — Italics throughout this brief have been supplied.

Petitioner also states (p. 6 footnote) that "checkmen" were "paid a small salary for performing" a distribution service. This respondent had no "checkmen," if by this term is meant newsboys who received money or checks from the company for services performed. Nor is it true, as stated by petitioner (p. 6 footnote), that "main spot" boys were ever "conceded" to be employees.

Petitioner also states (p. 7) that this respondent maintains "supervision" over the newsboys through "'checkers' who patrol the districts, noting whether the checkmen and newsboys . . . 'hustle' with due diligence, follow instructions as to the manner of displaying and calling papers, and otherwise conduct themselves in accordance with rules." There was no evidence that this occurred. This respondent's checker traveled a district for several days consecutively with months between each such check-up [R. 1451] to see that the territory was "covered," not only by newsboys, but by other retailers, *e. g.*, newsstands and drug stores. [R. 1446, 1450.] The sole duty he performed was to see that the "sales outlets" in the district were covered. [R. 1446, 1449.] There was no evidence that he noted or reported whether newsboys "hustled" or followed "instructions as to the manner of displaying and calling papers," or "conducted themselves in accordance with rules." There was no evidence that there were any rules. There was no evidence that the checker ever spoke to a single newsboy. [R. 1452.]

Petitioner also states (p. 8) that respondent furnishes transportation to the newsboys from its plant to their respective corners and after work is over brings them back. The evidence was that this was an accommodation provided if and only if requested by the newsboys. [R. 1566.]

Petitioner also states (p. 12) that a newsboys' union "adjusted grievances through collective action." If this implies that this respondent ever dealt with the union as a representative of respondent's employees, then there was no evidence to substantiate any such implication. At meetings at which this respondent's business manager was present [R. 668], it was pointed out that the newspapers would not consider the negotiation of a contract with the union until it should be decided that the newsboys were employees. [R. 672, 680.]

Respondent does not concede that there was evidence supporting petitioner's general assertion (p. 6) that "newsboys are 'hired' and 'fired,' disciplined, directed, and supervised . . .," or the assertion (pp. 8, 9) that respondent exercised "extensive control over the details of the newsboys' selling activities," or that respondent instructed the newsboys "in what part of the street to stand, and how to hold and display the papers."

ARGUMENT.

1. The Court Below Properly Determined for Itself the Meaning of "Employee" as Used in the National Labor Relations Act.

The meaning of the word "employee" as used in the Act was a judicial question.[1] It was a question which the court below was required to determine for itself. In making such determination the court below was not bound to adopt the conclusion of the Board upon this judicial question. In placing its own construction on the word "employee," the court below acted in accord with applicable decisions of this court.[2]

Gray v. Powell, 314 U. S. 402; *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177; *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251; *Rochester Telephone Corp. v. United States*, 307 U. S. 125; and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, cited by

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[1] In *United States v. American Trucking Ass'ns.*, 310 U. S. 534, 544, it was said: "The interpretations of the meaning of statutes, as applied to justiciable controversies, *is exclusively a judicial function.*"

[2] As said in *Sanford's Estate v. Commissioner of Int. Rev.*, 308 U. S. 39, 52: "*But courts are not bound to accept the administrative construction of a statute* regardless of consequences, even when disclosed in the form of rulings."

In *Federal Trade Comm. v. Gratz*, 253 U. S. 421, 427, it was said: "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. *It is for the Courts, not the Commission, ultimately to determine, as matter of law, what they include.*"

Also, in *United States v. United Verde Copper Co.*, 196 U. S. 207, 215, it was said: "The Secretary of the Interior attempts by it [*i.e.*, a regulation] to give an authoritative and final construction of the statute. This, we think, is beyond his power.

petitioner (pp. 13, 16) do not warrant a departure from this rule. Therein the point in controversy was not a dispute concerning the meaning of the terms of an Act of Congress, but was whether the facts fell within or without an accepted statutory meaning.[3]

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[3]In *Gray v. Powell*, 314 U. S. 402, the question presented was whether a railroad-consumer of coal was also a "producer" under the Bituminous Coal Act. If so, it was exempt from Code provisions fixing minimum and maximum prices. The Commission determined that the railroad was not a "producer." The opinion does not indicate any controversy over the meaning of the word "producer." The real controversy was whether the facts brought the railroad within the concept "producer." Thus, upholding the Commission's determination, it was said (p. 413):

> "Unless we can say that *a set of circumstances deemed by the Commission to bring them within the concept 'producer'* is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed."

In *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, the question presented was whether respondent was an "interurban electric railway." If so, it was excepted from the operation of the Railway Labor Act. The Commission found that respondent was not an "interurban electric railway." The opinion does not indicate any dispute as to the meaning of the term "interurban electric railway." The controversy was whether the facts found by the Commission placed respondent in this category. Thus, upholding the Commission's determination, it was said (pp. 180, 181):

> "As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency *to determine the question of fact* whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive.
>
> . . . . . .
>
> The Commission's determination was *one of fact*."

In *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, the question presented was whether a deceased had been a member of the "crew" of a certain vessel, as that word was used in the Longshoremen's and Harbor Workers' Compensation Act. If so, deceased was excluded from the benefits of the Act. The deputy commissioner found that deceased was not a member of the "crew." Upholding such determination, consideration was first given (p. 258

Moreover, the word "employee" is descriptive of a *legal* relationship. The facts necessary to give rise to this relationship will depend upon *the legal definition* of the relationship. This differentiates the instant case from the cases cited by petitioner. "Producer" (*Gray* case), or

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et seq.) to the meaning of the word "crew." Concluding (p. 260) that it meant "employees on the vessel who are naturally and primarily on board to aid in her navigation," it was said (p. 260):

> "Regarding the word 'crew' in this statute as referring to the latter class, we think there was evidence to support the finding of the deputy commissioner."

Thus, the court first determined the true meaning of the language of Congress, and then turned to the facts found by the administrative officer to see whether they brought deceased within the purview of such meaning.

In *Rochester Telephone Corp. v. United States*, 307 U. S. 125, one of the questions presented was whether the Rochester Company was under the "control" of the New York Telephone Company. If so, it was subject to the Communications Act of 1934. The Commission determined that "control" existed. This determination was upheld, not by accepting an interpretation placed upon the word "control" by the administrative body, but by concluding that the facts found by the latter brought the Rochester Company within the meaning of this statutory language. Thus it was said (p. 144):

> "The justification for this finding clearly emerges from a rapid summary of the governing *facts adduced before the Commission* concerning the relationship between the New York and the Rochester."

In *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, one of the questions presented was whether appellant was mining "bituminous coal." If so, he was subject to the Bituminous Coal Act. The Act contained a somewhat detailed definition of the term "bituminous coal," and the opinion does not indicate a controversy over the meaning of this term. The Commission determined that appellant's coal was "bituminous coal." The real controversy was whether the facts found by the Commission brought appellant's coal within the meaning of the statutory language. Thus, upholding the determination of the Commission, it was said (p. 400):

> "That guide is sufficiently precise for an intelligent *determination of the ultimate questions of fact* by experts.
>
> . . . . . .
>
> And it [*i. e.*, Congress] could delegate to that agency the *determination of the question of fact* whether a particular coal producer fell within the Act."

"interurban electric railway" (*Shields* case), or "crew" (*South Chicago* case), or "control" (*Rochester* case), or "bituminous coal" (*Sunshine* case) are matters whose existence or non-existence may be correctly determined by the factual inquiry of an administrative non-legal expert without scrutiny of legal precedents. Words of this character have no particular legal relationship background or connotation. "Employee," on the other hand, connoting as it does a legal relationship, can be found to exist only by first correctly determining the meaning of the word by resort to legal precedents.[4] Like "husband and wife," the existence or non-existence of this relationship cannot be correctly determined without resort to legal definition. As hereinafter pointed out, the legal definition of "employee" was evolved by judicial decision prior to the National Labor Relations Act, and must have been what Congress had in mind in using this word "employee."

Petitioner asserts (pp. 13, 14, 15) that *Walker v. Altmeyer*, — Fed. (2d) — (C. C. A. 2, July 12, 1943), conflicts with the opinion of the court below. It is submitted that no such conflict exists.

In the *Walker* case the error of the District Court was stated to be

> ". . . that of substituting new and contrary *inference* of its own *from the found facts* which led it to reverse the administrative conclusion which had been reached as to the employee status of the plaintiff."

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[4]Cf. *United States v. Merriam*, 263 U. S. 179, 187, where it is said that the word "bequest" has a "*judicially settled* meaning."

There was no intimation in the *Walker* case that the court was *bound by a meaning* given by the administrative body to the terms of the Act.

Here the question presented is not whether the court might draw inferences from facts found by the administrative body contrary to inferences indulged by the latter. The question presented is whether the court *must adopt the meaning* given by the administrative body to the language of Congress.

The word "employee" in the National Labor Relations Act[5] delimits the authority and jurisdiction of the Board. To say that a reviewing court is bound by the meaning given to such word by the Board, would be to say that the Board may conclusively determine its own authority and thus conceivably expand the scope of that authority free from all judicial restraint.

In *Federal Trade Comm. v. Raladam Co.*, 283 U. S. 643, 654, affirming the reversal of a cease and desist order issued by the Commission, it was pointed out that

> ". . . one of the facts necessary to support jurisdiction to make the final order to cease and desist, is the existence of *competition;* and the commission cannot, by assuming the existence of competition, if in fact there be none, give itself jurisdiction to make such an order."

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[5]The instant case arose out of a complaint issued by the Board on December 5, 1941 [R. 357] charging respondent with unfair labor practices in violation of Sec. 8 (1) and (5) of the Act. These provisions of the Act (U.S.C.A., Title 29, sec. 158) read:

> "Sec. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce *employees* in the exercise of the rights guaranteed in section 7;
>
> . . . . . .
>
> (5) To refuse to bargain collectively with the representatives of his *employees*, subject to the provisions of section 9 (a)."

Similarly, in the instant case the existence of an *employee-relationship* was a prerequisite to jurisdiction, and the Board could not, by assuming the existence of such relationship on the basis of its own faulty interpretation of the Act, give itself jurisdiction to make the order here in controversy.

2. The Court Below Properly Held That the Word "Employee" as Used in the Act Must Be Given Its Conventional Meaning.

The court below declared [R. 1848]: "Since the term 'employee' is not defined in the Act, we agree with petitioners' [herein respondents'] contention that it must be given its *conventional meaning as developed under the common law and statutory enactments.*"

The Board in the court below contended for a different meaning, viz., that "where the persons involved *function in a realistic economic sense as employees* of an industrial enterprise Congress intended them to be within the Act." [R. 1847.]

Thus petitioner asked the court below to give to the word "employee," used by Congress, a meaning which would vary according to the dicta of economic soothsayers, and therefore unpredictably vary from case to case.

Suppose this speculative and variable meaning were adopted for the word "employee" used by Congress. Unquestionably that word was a standard set by Congress to mark the limits of the Board's jurisdiction. What happens to an Act in which the standard set for the guidance and limitation of an administrative authority is uncertain? Unquestionably the Act becomes unconstitu-

tional.[6] Otherwise, the administrative authority would be endowed with those legislative powers which may only be exercised by Congress. Since an interpretation which would render a statute constitutional will be preferred to one which would render it unconstitutional,[7] the interpretation of the word "employee" contended for by petitioner should be discarded, as it was discarded by the court below. [R. 1848.]

The word "employee" should be given the meaning adopted by the court below, *i. e.*, "its conventional meaning as developed under the common law and statutory enactments." [R. 1848.] In placing this interpretation on the word "employee," the court below acted in accord with applicable decisions of this court. This is the meaning given the word "employee" under the Federal Employers' Liability Act by this Court.[8] It is also the meaning given the word "employee" under the Social Security Act by the lower Federal courts.[9]

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[6] *Panama Refining Co. v. Ryan*, 293 U. S. 388, 420; *Schechter Poultry Corp. v. United States*, 295 U. S. 495.

[7] *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407; *Knights Templars' Indemnity Co. v. Jarman*, 187 U. S. 197, 205.

[8] In *Robinson v. Baltimore & Ohio R. R. Co.*, 237 U. S. 84, 94, where it became necessary to determine the meaning of the word "employe" under the Federal Employers' Liability Act, it was said:

> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense, *and intended to describe the conventional relation of employer and employe.*"

Accord: *Hull v. Philadelphia & Reading Ry. Co.*, 252 U. S. 475, 479.

Of course, Congress will be presumed to have used a word in its "known and ordinary signification." *Levy's Lessee v. McCartee*, 6 Pet. 102, 110; *Old Colony R. Co. v. Commissioner of Int. Rev.*, 284 U. S. 552, 560; "in its usual and well-settled sense." *United States v. Stewart*, 311 U. S. 60, 63.

[9] See cases cited in the opinion below. [R. 1848, 1849.]

There is nothing in *National Labor Relations Board v. Blount*, 131 Fed. (2d) 585 (C. C. A. 8), cited by petitioner (pp. 18, 19), in conflict with the decision of the court below in holding that the word "employee" must be given "its conventional meaning as developed under the common law and statutory enactments." In the *Blount* case the majority opinion devoted considerable space to an examination of the statutes of Missouri and Missouri decisions to determine whether the tiff miners there involved had been regarded as employees, concluding that they had not. Obviously no such inquiry would have been relevant, if, as the Board contends in our case, the true meaning of the word "employee" is not (1) "its conventional meaning as developed under the common law and statutory enactments," but is (2) whether the individuals involved "function in a realistic economic sense as employees."

3. The Court Below Properly Held That There Was No Substantial Evidence That the Newsboys Were "Employees" in the Conventional Sense.

There can be no doubt that newsboys selling newspapers under the conditions disclosed by our record were not "employees" according to a well settled line of decisions going back to a date prior to the National Labor Relations Act.

New York Indemnity Co. v. Industrial Accident Comm., 213 Cal. 43, 1 Pac. (2d) 12;

Birmingham Post Co. v. Sturgeon, 227 Ala. 162, 149 So. 74;

Creswell v. Charlotte News Publ. Co., 204 N. C. 380, 168 S. E. 408;

Bernat v. Star-Chronicle Publ. Co. (Mo. App.), 84 S. W. (2d) 429;

Balinski v. Press Publ. Co., 118 Pa. Sup. 89, 179 Atl. 897.

Petitioner intimates (p. 24, and footnote 16) that there is diversity of judicial opinion concerning the status of newsboys under these conditions, and asks the Court to compare the cases we have cited with certain other cases involving newspaper publishers. The latter are not in point,[10] and in no wise weaken respondent's position: that by the settled course of judicial decision newsboys operating under the conditions disclosed by our record are not "employees."

It is true that the cases we have cited arose under state workmen's compensation laws. However, these laws made no more attempt to define the word "employee" than did the National Labor Relations Act, and their beneficent policy presumably forbade any narrow construction of that relationship.

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[10]In *Salt Lake Tribune Pub. Co. v. Industrial Comm.*: 99 Utah 259, 102 Pac. (2d) 307, a *carrier*, not a newsboy, was involved. Such carrier, under the close supervision of a district manager, was required to deliver newspapers to subscribers, make collections and obtain new subscribers. Carriers were required to attend occasional meetings and keep a route card for each customer (to be returned to the company). Subscribers were customers of the company, not customers of the carrier.

In *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 3 Cal. (2d) 759, 47 Pac. (2d) 270, the "newsboy" involved was paid a bonus to compensate him for being on a designated corner at certain specified hours to handle the company's newspaper exclusively.

In re Scatola, 282 N. Y. 689, 26 N. E. (2d) 815, involved a *route carrier* who delivered the publication to persons who had contracted with the company to subscribe therefor. Copies not thus used could not be sold on the streets. This memorandum opinion affirms 257 App. Div. 471, 14 N. Y. S. (2d) 55, 56, where it is

Under the cases we have cited, the evidence before the Board excluded the newsboys from the category of "employees." The newsboys purchased their merchandise at a wholesale price and derived their entire profit from their retail sales at a higher price, the volume of such profit being dependent upon their success in conducting such retail sales. [R. 92, 1566.] Methods to be used in attracting customers were determined by the newsboy. [R. 1413.] The question whether credit should be extended to customers was determined solely by the newsboy. [R. 1416, 1417.] The newsboy, on occasion, hired others to assist him and made a profit in so doing. [R. 1488, 1489, 1492.] The right to sell competing publications at the same time was frequently exercised [R. 106, 1448], and of course no allocation of time spent as between the competing publications could be made. The right to cooperate with other newsboys selling competing

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said: "The relation between this carrier and publisher differs from that of a newsboy who purchases papers and sells them on the street corner through crying his wares."

In *Wilson v. Times Printing Co.*, 158 Wash. 95, 290 Pac. 691, a *rural route carrier*, not a newsboy, was involved. A part of his earnings were in the form of a fixed monthly salary. Deliveries and collections by the carrier were under the close supervision of a company representative, and collections were receipted for on a form which stated that payment was being received "for the company."

The decision in *Hampton v. Macon News Printing Co.*, 64 Ga. App. 150, 12 S. E. (2d) 425, involved a *route carrier* who, under the supervision of a substation or district manager, delivered the newspaper to a list of the company's subscribers. When the carrier failed to collect from any of the latter, the company billed the subscriber as the company's debtor. (The weight to be given this decision was subsequently questioned in *Macon News Printing Co. v. Hampton*, 192 Ga. 623, 15 S. E. (2d) 793.)

Gallaher v. Ricketts, 187 So. 351 (La.), annulled 191 So. 713, likewise involved a *route carrier*, who had no interest in the route, and who delivered newspapers to the company's customers under "special instructions respecting the methods to be used . . ."

publications was exercised by the newsboys for their mutual benefit. [R. 1417, 1418, 1419, 1449, 1612, 1613, 1617, 1923.] Other factors emphasizing the absence of any employee relationship are pointed out in the opinion of the court below. [R. 1850, 1851.] The newsboys were known to respondent only as sales outlets, and they occupied a position no different from that occupied by various other retail sellers of the newspaper, such as drug stores, cigar stands, and newsstands.

Undoubtedly, in determining whether the status of the newsboys was that of employees, the question of control or lack of control over the newsboys was a matter of importance. However, a certain measure of control may exist without any employee status resulting. The control which produces an employee status must be a control of the means and methods of performance.[11] Furthermore, the control which produces an employee status must be a complete control.[12] Moreover, "mere suggestion as to details or the necessary cooperation,

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[11] *Fidelity & Casualty Co. v. Industrial Acc. Comm.*, 191 Cal. 404, 407; 216 Pac. 578, 579;
Lenkuhl v. Clark, 209 Minn. 276; 296 N. W. 28, 29.

[12] *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 811;
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Lee v. Nanny, 38 Cal. App. (2d) 90, 92; 100 Pac. (2d) 832, 834.

where the work furnished is part of a larger undertaking," does not establish such control as to indicate an employee status.[13] No substantial evidence[14] before the Board pointed to any such control by respondent over the operations of the newsboys.

Conclusion.

The decision of the Circuit Court of Appeals is correct, and presents no conflict of decisions or unsettled question of federal law or departure from the accepted and usual course of judicial proceedings. The Board's petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1943.

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[13] *Standard Oil Co. v. Anderson*, 212 U. S. 215, 222.

[14] "*Substantial* evidence" to support the Board's findings was requisite. *Consol. Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229. To be "substantial," evidence must afford "a substantial basis of fact" and be "more than a scintilla" and "do more than create a suspicion of the existence of the fact to be established." *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299.